In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 701

BURT HYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and four of five co-defendants were convicted of conspiracy to violate 29 U.S.C. 501(c).[2] Peti-

[1] "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

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tioner was sentenced to five years' imprisonment and fined $5,000 (Tr. 2709).[1] The court of appeals affirmed (Pet. App. 8–17; 350 F. 2d 171).

The details of the conspiracy are set forth in the government's brief in opposition to the petition for certiorari filed by co-defendant Scalza (No. 632, pp. 3–7) and will not be repeated here. Briefly, petitioner and others were shown to have systematically converted funds of a local of the United Textile Workers of America by having the local's records reflect salaries and expenses that were not in fact paid as shown, but, instead, were used to create a weekly cash surplus of $210 which was regularly turned over to petitioner and two co-defendants. The weekly siphoning of the local's funds began shortly after petitioner, an organization director and vice-president of UTWA, was appointed trustee of the local in 1957, and continued at least until the early part of 1963 (Tr. 241–242). The payments were delivered by different union employees either to a bookstore operated by Reuben Levin, to petitioner's office, or to another office with which petitioner was associated (Tr. 82–89, 211–214, 892–895, 1200–1201, 1655–1657).

1. There is no merit in petitioner's contention (Pet. 4) that the prosecution "obtained an unfair and incurable advantage" from a government witness' reference to the Fifth Amendment privilege and his assertion of a grant of immunity. When

[1] "Tr." refers to the sixteen-volume trial transcript filed with this Court by co-defendant Scalza in connection with his petition for certiorari (No. 632). That petition raises issues entirely different from those involved here.

called to testify for the government, Reuben Levin was asked, "On your initial appearance before the grand jury, did you testify fully and freely?" (Tr. 1749). Levin replied, "I answered questions with the general answer that I refused to testify on the grounds of the Fifth Amendment" (Tr. 1750). The motion for a mistrial thereupon made at sidebar by counsel for co-defendant Cotliar was denied, the trial court noting that the witness did not have to answer as he did and that there had been no misconduct on the part of the prosecution. The witness then testified that he had received an immunity from prosecution under the Labor-Management Reporting and Disclosure Act of 1959. Cotliar's counsel objected to this testimony on the ground that the jury might get the impression that Levin was granted immunity by the grand jury. In denying this objection, the court offered to render a clarifying instruction, if requested (Tr. 1757, 1759). The only instructions on this subject requested by defense counsel, however, were to the effect that Levin was under no grant of immunity whatsoever, and these the court properly refused to give. In his testimony, Levin's only mention of petitioner was his statement that, in 1959, the local's bookkeeper had given him an envelope at his bookstore, stating that "Burt [petitioner] had sent this for Sol [Cotliar]" (Tr. 1772).

The fact that a witness had refused to testify before the grand jury until granted immunity—like the fact that he had pleaded guilty—has a bearing on the witness's credibility, and the government is

plainly entitled to elicit it on direct examination rather than leave it to be brought out by the defense.[2]

As in *United States* v. *Freeman*, 302 F. 2d 347 (C.A. 2), certiorari denied, 375 U.S. 958, in which the court held it proper for the prosecution to bring out a witness' criminal record on direct examination, the information elicited here had "clear relevance", and the failure to disclose it might well "have subjected the prosecution to criticism" (302 F. 2d at 350). The court's discussion in *United States* v. *Aronson*, 319 F. 2d 48, 51 (C.A. 2), certiorari denied, 375 U.S. 920, is apposite here:

> In practically every criminal prosecution, the government's principal witness or witnesses are drawn from the ranks of co-defendants, co-conspirators, or participants in the allegedly unlawful enterprise. Often they have pleaded guilty before trial. And so here. * * * The prosecutor called Kimball and, adhering to the time-honored and approved practice, asked him if he had ever been convicted of a crime. * * * Counsel on direct examination usually adopt the policy of bringing out such adverse facts as they know will be developed on cross-examination. Failure to disclose would then be characterized as an intent to conceal.
>
> Needless to say, a subject so common to criminal trials has been passed upon by many appellate courts so that there is no longer any uncertainty as to the law.

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[2] Indeed, Levin was extensively cross-examined by counsel for co-defendant Cothar concerning the grant of immunity (Tr. 1914-1922).

The cases relied upon by petitioner are not in point. *United States* v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2), and *United States* v. *Gross*, 276 F. 2d 816 (C.A. 2), certiorari denied, 363 U.S. 831, involved the prejudicial use of a prior claim of the privilege against self-incrimination to impeach a defense witness and the defendant, respectively. In those cases, the court held that the assertion of the privilege was not inconsistent with the witnesses' trial testimony and that the probative value of the prior claim of privilege was outweighed by the possibility that the evidence would be misused by the jury. As the court below correctly observed, these decisions "do not support the proposition that facts affecting credibility of a friendly witness cannot be developed on direct examination within reasonable limits" (Pet. App. 14).

In any event, Levin's testimony formed an insignificant part of the evidence of petitioner's criminal conduct. The single sentence in Levin's testimony relating to petitioner is surplusage, since ample other testimony showed petitioner to have been not just a participant, but the chief promoter of the unlawful conspiracy (Tr. 209–216, 235–237, 241–242, 257–258, 659–660, 675, 754–755, 844–845, 874–884, 890, 910, 1031–1037, 1205–1206, 1473, 1528–1649 1672–1674, 1720, 1964–1967, 1975–1977, 2206–2226, 2414–2420, 2442–2447). See *Carter* v. *United States*, 281 F. 2d 640 (C.A.D.C.), certiorari denied, 364 U.S. 880.

2. Petitioner rightly concedes (Pet. 5) that there is considerable authority for the proposition that evidence of events antedating the enactment of a

statute is admissible in a prosecution for conspiracy to violate that statute. Such evidence may be relevant to show how the conspiracy came into being and its mode of operations (*United States* v. *Witt*, 215 F. 2d 580 (C.A. 2), certiorari denied *sub nom. Talanker* v. *United States*, 348 U.S. 887), to demonstrate a course of conduct (*United States* v. *Heike*, 227 U.S. 131), to show knowledge or intent (*United States* v. *Lightfoot*, 228 F. 2d 861 (C.A. 7), reversed on other grounds, 355 U.S. 2), or to indicate the purpose and character of the conspiracy (*United Mine Workers* v. *Pennington*, 381 U.S. 657, 660–661, 670, n. 3). In the present case, the prestatutory evidence was relevant for all these purposes. As stated by Judge Learned Hand in *United States* v. *Dennis*, 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494, "* * * it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed."

In addition to the evidence that petitioner participated in defrauding the union before the enactment of the statute which made his acts a crime, the prosecution amply connected petitioner with the conspiracy which existed after September 14, 1959. It is only for his conduct on and after that date that petitioner was brought to trial and found guilty (see the court's explicit instructions, Tr. 2608–2612).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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